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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

_____

In the Matter of the Petition of

MANUEL ALEMAN,

Next friend of

DAVID ALEMAN, an infant,

Petitioner,

- against -

JULE M. SUGARMAN, as Commissioner of the New York City Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, MANUEL ALEMAN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Second Circuit entered in this proceeding on October 18, 1972.

OPINION BELOW

There was no opinion of the Court of Appeals, but an affirmance from the Bench. The relevant opinion of the District Court for the Southern District of New York is reported in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 18, 1972. This petition for certiorari was issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1) Where a parent lost all custodial rights in his child after Family Court proceedings in which, during the initial and crucial stage, he was neither present nor represented by counsel: Should the Federal District Court exercise its habeas corpus jurisdiction when the State Court, by a non-appealable order, transferred a habeas corpus and constitutional attack back to the Family Court which created the unconstitutional condition and refused to re-open the case on a constitutional basis?

STATEMENT OF THE CASE

Petitioner father MANUEL ALEMAN returned to New York from working in the Merchant Marine in November, 1970 (A 6-7) to visit his present wife and children. He found, however, that on October 8, 1970, while he was at sea, there had been a courtroom proceeding wherein his three children were found neglected by Judge Bolin and put in institutions until August 9, 1972 (A 9). He had not been present at that hearing (A 16-17). He repeatedly went to court asking how to get his children back and was unable to do so. He finally decided that he needed an attorney and, on June 15, 1971, Jonathan Weiss, his present attorney, became his lawyer. The lawyer discovered that petitioner had never been served with any papers or

informed as to the nature of the proceedings. On July 14 and July 29, 1971, there were Family Court proceedings held in regard to petitioner DAVID ALEMAN, a child born on May 15, 1971, whose father has never been permitted to see him at home.

At those hearings, counsel made a number of motions, including attacks on jurisdiction and the constitutional basis of the proceedings. In particular, objection was made to the fact that the previous adjudication as to neglect of the three children the father lost, was used as evidence that DAVID ALEMAN would be neglected and the father was neither present nor represented by counsel (A 20, 21). These motions were denied. Transcripts were ordered but have never been delivered (A 21,22).

Following those hearings, the court adjudicated the child DAVID ALEMAN neglected, on the grounds that a preponderence of evidence indicates the mother was "mentally ill" and "the father has been in and out of the family life and there is no evidence that he has provided or will provide a suitable home for the children" (A 7).

On December 28, 1971, the father petitioned the Family Court for return of the child (A 9). Petitioner testified that he lived at home and, following doctor's orders, cared for the mother and was awaiting the return of the children and involvement with his family so that he could return to work (A 9-10). The court had before it the testimony of a psychiatrist that the mother was capable of caring for a child (A 4). Nonetheless,

the court ruled against the return of the child to the father on the ground that there was "not a home in which adequate care, mothering, or even minimal supervision needed by David can be provided." That decision was dated December 31, 1971.

On March 9, 1972, the State Court petition for habeas corpus was heard. The grounds of the habeas corpus were the emergency, the lack of jurisdiction in the Family Court and the lack of constitutional procedure and, in particular, the inference to present neglect based on past neglect findings when the father was not present or represented by counsel (see A 15 and A 23). The case was not heard at all but remanded, over objection, to the Family Court.

Following the remand on March 9, 1972, petition for habeas corpus was brought before the District Court of the Southern District of New York in front of the Honorable Edward Weinfeld. The argument, based on the emergency of the situation, the futility of the return to Family Court and the inordinate delays engendered thereby was made but rejected by the court in an opinion dated April 5, 1972 (A 26). The constitutional arguments and jurisdictional arguments were advanced at that time and were not considered because the District Court declined to exercise this jurisdiction. This refusal to exercise jurisdiction was appealed to the Court of Appeals for the Second Circuit which affirmed, after argument, on October 18, 1972.

I.

FEDERAL HABEAS CORPUS JURISDICTION SHOULD BE EXERCISED TO PRESERVE FUNDAMENTAL CONSTITUTIONAL RIGHTS, PARTICULARLY IN SITUATIONS WHERE RECOURSE TO STATE COURTS HAS PROVEN AND WILL PROVE TOTALLY FUTILE.

1.

INTRODUCTION

The issue that this case presents is a crucial one for review in the United States Supreme Court, for it raises sharply the question of the federal court's responsibility to protect federal constitutional rights when the State Courts have either been unwilling or unable to do so. The general principles governing federal habeas corpus are well-known and well-stated in such cases as Fay v. Noia, 372 U.S. 391 (1963), Ex Parte Hawk, 321 U.S. 114 (1944) (see also, Note 83 Harv. L. R. 1038 (1970)).

The governing principles, of course, stress the necessity of orderly and efficient State Court administration, the importance of federal-state comity and the importance of habeas corpus as a foundation stone of federal democracy. All the factors that necessitate the exercising of federal habeas corpus jurisidiction are present in the instant case. They are the violation of fundamental constitutional rights; a federal question about which there is no factual dispute; the actual exhaustion of state remedies; the futility of further pursuit of state remedies and the increasing of State Court efficiency.

ii.

It is Clear that Where There are Substantial Constitutional Rights Violated, There is a Necessity for Exercising Federal Habeas Corpus.

Habeas corpus "is not now and never has been a static, narrow formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongful restraint upon their liberty," Jones v. Cunningham, 371 U.S. 236 (1963) at 243. See also, Fay v. Noia, supra; Bowen v. Johnston, 306 U.S. 19 (1939) at 27. Two constitutional rights are at stake in the instant case. The first is that of right to counsel whenever the deprivation of constitutional rights may ensue in a proceedings. The second is that of family rights, in particular, those of

a father to his son.

a) The Right to Counsel is Fundamental and Must be Protected by a Federal Habeas Corpus.

It is now well-settled that the right to an attorney is crucial for due process. This court has held in Powell v. Texas, 392 U.S. 514 (1968) and Gideon v. Wainwright, 372 U.S. 335 (1963) that there can be no conviction and incarceration unless the individual is afforded effective representation by an attorney. In cases involving financial necessity, counsel cannot be denied. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1969). The rationale is clear. The devastating effect and technical operation of the law makes it beyond the competence of a layman (let alone an uneducated, poor

and foreign-language speaking, individual as in this case) to present his side of the case and preserve his rights. The court will not be equipped to adjudicate without an advocate for the person nor will the judicial process afford protection for the individual without a counselor. This rationale and reasoning has been applied in misdemeanor cases, Argersinger v. Hamlin, 401 U.S. 908 (1972). In particular, in the case of In Re Gault, 387 U.S. 1 (1967) it was held that the right to counsel is a fundamental requirement of due process in a Family Court proceeding where a juvenile may be incarcerated. In the instant case, of course, the juvenile was institutionalized against his parents' wishes, and without the parent being represented. Directly in point with this situation is

a case in the New York Court of Appeals decided at a date after the initial filing of this federal habeas corpus, reversing a finding of neglect in Family Court because the mother had not intelligently waived her right to counsel. In Re Beaton, 30 N.Y.2d 352, 334 N.Y.S.2d 133 (1972).

It is clear that petitioner father should have had counsel to present his case when the initial neglect finding was made against him in regard to the first three children. Yet, petitioner was not even informed of the proceedings, nor was he present at the proceedings, and no lawyer ever spoke for him at these proceedings. That such finding of neglect was used in a subsequent proceedings as conclusive evidence that he would neglect his son, the subject matter

of the present habeas corpus, only compounds the denial of effective counsel, and no more effective denial of due process could be imagined. The use of prior, uncounseled convictions to either impeach a criminal defendant's credibility, support his guilt or enhance his punishment constitutes a denial of due process. Burgett v. Texas, 389 U.S. 109 (1967), United States v. Tucker, 92 Sup. Ct. 589 (1972), Loper v. Beto, 92 Sup. Ct. 1014 (1972) "...since the defect in the prior conviction was denial of the right to counsel the accused in effect suffers anew from the deprivation of... that right" Burgett v. Texas at 115. The principle of these criminal cases should be even more stringently applied where the adjudication involves parental

rights and the sanctity of the family unit. Yet, the Family Court refused to open the case; the State Court refused to entertain the habeas corpus brought on those grounds, and the District Court refused to exercise the habeas corpus powers to preserve these fundamental rights. This Court could ensure that, when all courts in a state refuse to protect such fundamental rights, these rights are protected by exercise of federal habeas corpus jurisdiction.

b. The Fundamental Importance of the Family Unit has Long Been Recognized by This Court.

Familial rights are constitutional sacrosanct. "Children have a very special place in life which the law should reflect." May v. Anderson, 345 U.S. 528,

536 (1953) (Frankfurter, J. concurring). "The child is not the mere creation of the state, those who nurture him and direct his destiny, have the right, coupled with the high duty to recognize and prepare him for additional obligations," Pierce v. Society of Sisters, 268 U.S. 510 (1925) at 535.

Thus, it has been held that parents have a right to pick a parochial school if they think their children are not getting a proper education in public school. Pierce v. Society of Sisters, supra (and receive subsidies of free transportation to non-public schools). Everson v. Board of Education, 330 U.S. 1 (1946), choice of language taught in schools is constitutionally protected; Meyers v. Nebraska, 262 U.S. 390 (1923), as is a school child's refusal to salute

the flag aginst his religious beliefs; West Virginia v. Barnette, 319 U.S. 624 (1943). The recent case of Stanley v. Illinois, 92 Sup. Ct. 1208 (1972) involving specifically a father's rights, summarizes these cases and emphasizes the fundamental importance of parental rights. Most instructive is the case of Armstrong v. Manzo, 380 U.S. 545 (1965) where it was held that a father could not lose custodial rights of his child through adoption proceedings when he was not properly notified in a timely and meaningful way or afforded due process. In the instant case, the father was never notified, never represented and never afforded due process. New York State, in its highest court, does not disagree with such a concept of parental rights. For example, in Scarpetta v.

Spence-Chapin Adoption, 28 N.Y.2d 185, 269 N.E.2d 787 (1971) it affirmed the "[P]rimacy of status...accorded the natural parent" even when there may be cultural advantage with another set of parents or institution. "In no case, however, may a contest between a parent and non-parent resolve itself into a simple factual issue as to which affords the better surroundings or as to which party is better equipped to raise the child [cite] ." at 193, 194. See cites therein for other New York cases.

The state has violated the decisions of this Court which held that the family is a special unit and the rights of fathers and parents, in general, are to be afforded great consideration and due process. In this case, of course, this parent was given the shortest shrift imaginable.

What is to be done to rectify this destruction of parental rights? The urgency is clear. "This court has not, however, embraced the general proposition that a wrong may be done if it can be undone [citation]....[I]f there is a delay between the doing and the undoing, petitioner suffers from deprivation of his children, and the children suffer from uncertainty and dislocation," Stanley v. Illinois, supra, at 1211. Petitioner has never had his son home. He has never had a final order in Family Court. He was refused a hearing in State Court. The wrong has been done. He suffers deprivation and the children suffer dislocation. Surely, the lesson of Stanley v. Illinois, supra, is plain; the federal court should exercise

habeas corpus jurisdiction to protect the constitutional rights of the family and of the father.

iii.

Habeas Corpus Jurisdiction in a Federal Court Should be Exercised when There is a Federal Question About Which There is no Factual Dispute.

The habeas corpus sought, first in the State Court and then in federal court, rests upon a number of constitutional propositions: the right to counsel, the rights of the parents discussed above, the unconstitutionality of various provisions of the statute and denial of due process in proceedings which deprived petitioner of his infant son. These are federal constitutional questions. There is no factual dispute as to whether petitioner was either

present or had counsel present when a finding of neglect was entered which cost him the complete panoroma of custodial rights. To this issue, the language of Roberts v. LaVallee, 389 U.S. 40 (1967) speaks directly. "We can conceive of no reason why the state would wish to burden its judicial calendar with a narrow issue, the resolution of which is pre-determined by federal principles" at 43 (there free transcripts for appeal). Federal principles determine that a parent cannot lose custodial rights without constitutional due process. The State Court refused to burden its judicial calendar with a habeas corpus on this issue. Clearly, the Federal Court should now act. See, for examples of such exercise of such federal habeas corpus jurisdiction in

analogous situations, Evans v. Cunningham, 335 F.2d 491 (4th Cir., 1964); Cf. Piccard v. Connor, 92 Sup. Ct. 509 (1971)

Federal courts sit to give federal remedies for deprivations of federal rights. Petitioner father is deprived of his child and of his constitutional rights by Family Court. The State Courts have refused to act; the Federal Court must.

iv.

The Futility of Having Family Court Judge the Constitutionality and Correctness of its Own Past Decision and Procedures Necessitates Issuance of a Federal Habeas Corpus.

The facts in this case are quite startling. When a habeas corpus was brought in a State Court to examine the constitutionality of the jurisdiction

and procedures in the Family Court, the State Court, without any hearing whatsoever, referred it back to that same Family Court. It is axiomatic that no judge should judge his own case. Yet, here we have a court, not only judging its own case, but also the likelihood that the same judge will sit to determine the constitutionality of his own past procedures in the case.1/ The pursuit of a remedy which simply remands the issue to the same court which had been given the opportunity to consider the matter initially, and did so -- rejecting the claim in the very same case -- is simply a run-around. Such a "remedy" is far more hollow than

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1/ It is an informal but widely recognized procedure in New York City Family Court to refer cases back to the judge who first heard the case. See generally In Re A., 319 N.Y.S.2d 691 (1971).

the requirement rejected by the Sixth Circuit that a petitioner appeal in the face of an adverse line of decisions, Lucas v. Michigan, 420 F.2d 259 (6th Cir., 1970). There, the adverse decision was on the same issue. In the instant case, the court called on to decide has already ruled adversely on the same issue in the same case. Cf. Slayton v. Smith, 92 Sup. Ct. 174 (1971). Wilwording v. Swensen, 92 Sup. Ct. 407 (1971). Piccard v. Connor, supra. Common sense dictates that a court whose jurisdiction and constitutionality have been collaterally attacked in state habeas corpus should not be the arbitrator of those questions. In fact, Appellee himself suggests the futility of the Family Courts' considering these issues,

"We cannot agree to the theory (petitioner's brief) that speed is the primary consideration here. The primary consideration in a case involving neglect is the welfare of the child." P. 11, Appellee's brief, in the Second Circuit.

Other Courts of Appeals have recognized the strength of the arguments raised here. See, e.g., Odsen v. Moore, 445 F.2d 806 (1st Cir., 1971) which held that an aggrieved party need not perserve in perpetuity before he could complain of failure to a federal court. Most directly does Rowe v. Peyton, 383 F.2d 709 (4th Cir., 1967) speak to this case. It held that the petitioner was not required to travel the same road to State Courts to present the question which State Courts had so recently

decided when there was no indication that the State Court was prepared to depart from the former court's decision. A fortiori, this father who is deprived of his son is not required to go back to the same court to raise the same questions to the same tribunal which has already ruled against him. See also, Colely v. Alvis, 381 F.2d 870 (6th Cir., 1967).

The instant case is a study in tragedy and frustration. Close to thirty appearances have been made in this case, which has stretched over two years. The child has been institutionalized since birth. To our knowledge, neither the Family Court nor the Department of Social Services have ever maintained that this institutionalization is desired or saluatory. At most, the attempted

claim has been that the institution is the lesser of the two evils; superior to a home life which fails to meet minimal standards. Both parents have been to Family Court over thirty times seeking their children. Counsel for petitioner and even the psychiatrist has urged the return of the children. Yet, not only are the child DAVID ALEMAN and his father being denied their present right to the present enjoyment of the parent-child relationship but also the possibility of a satisfying and profitable relationship in the future is being inexoribly destroyed. In this connection, one sometimes wonders whether some Kafkafesque variant upon Solomon has devised these procedures for dealing with the custody of children; whether the

instruments proposed for resolving such disputes does not tear the child in half. With such a potential for tragedy in the background, petitioner had to seek the quickest route to an independent judgment of the grave constitutional matters involved by first a state habeas corpus and then a federal habeas when the state remedy turned out to be only a remand to the same court and judge which tore the family apart, denied constitutional rights and thwarted procedural due process. No court has yet held a hearing on the constitutional question of parental rights, right to counsel and vagueness. Family Court dismissed them summarily. New York State Supreme Court dismissed the case. The Southern District would not allow a hearing.

The Second Circuit affirmed after argument. Petitioner pleads with this court to have his day in court, with counsel, on the constitutional issue and due process.

v.

Petitioner Has, In Fact, Exhausted His Remedies and Should, at least, be Given the Right to Prove that He is So Exhausted that He Deserves a Remedy.

Petitioner filed a state habeas corpus. Its remand to Family Court is a non-appealable order. There is no remedy for him left to pursue in State Court. See, in general, Jones v. Cunningham, supra, particularly fn. 4; In the Matter of Shuttlesworth, 369 U.S. 35 (1962) for the issuance of a habeas corpus in analogous settings. What constitutes actual State Court exhaustion

is stated in Fay v. Noia, supre. "Orderly criminal procedure is desideratum and, of course, there must be sanctions for flouting such procedure but that state interests competes...against an ideal... [the ideal of fair procedure] [citation] ....A practical appraisal of the state interest here does justify the federal court's enforcing on habeas corpus a doctrine of forfeiture under the guise of applying the adequate state-ground rule," 372 U.S. 432. "The rule of exhaustion is not one of defining power, but one which relates to the appropriate exercise of power." Bowen v. Johnston, supra; see also Wilwording v. Swensen, supra; Jones v. Cunningham, supra.

It has been held that the full pursuit of one line of state remedies

is sufficient to satisfy the exhaustion rule of 28 U.S.C. §2254. Brown v. Allen, 344 U.S. 443 (1953); Roberts v. LaVallee, supra. Moreover, that section was not intended to require repetitious applications to State Courts. Brown v. Allen, supra, at 448, n. 3. See also, Lucas v. Michigan, supra; Ex Parte Morgan, 78 F. Supp. 756 (S.D. Cal., 1948), aff'd sub nom.;Morgan v. Horrall, 175 F.2d 404 (9th Cir., 1949), cert. denied, 338 U.S. 827 (1949).

The delay of one year has been held inordinate in Smith v. Kansas, 356 F.2d 654 (10th Cir., 1966); of two years U.S. v. Russel, 282 F. Supp. 106 (E.D. Pa., 1968). Such is the case here. It is a matter of general knowledge that custody and neglect proceedings in New York State consume an inordinate amount

of time. For example, in a recent opinion, a Family Court judge felt compelled to vent his "frustration" at long delays in his court due to the "appalling" lack of essential personnel in its clinic, Heyward C. v. Mattie B., (N.Y. Fam. Ct.) N.Y.L.J., June 7, 1972 at 21, col. 3. And, as the following cases (all the ones in which counsel could find dates) indicate and illustrate the situation in the custody/habeas corpus area is no better at the appellate level:

Case	Dates of Reported Decisions
Matter of Lincoln v. Lincoln, 24 N.Y. 2d 270, 247 N.E. 2d 659, 299 N.Y.S. 2d 842 (1969)	Nov. 22, '67 (S. Ct.) July 9, '68 (App. Div.) Apr. 9, '69 (Ct. App.)
People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 113 N.E. 2d 801 (1953)	Dec. 15, '52 (App. Div.) July 14, '53 (Ct. App.)

Case	Date of Reported Decisions
People ex rel. Anonymous v. Anonymous, 10 N.Y.2d 332, 179 N.E.2d 200, 222 N.Y.S.2d 945 (1961)	June 21, '60 (S. Ct.) June 26, '61 (App. Div.) Nov. 30, '61 (Ct. App.)
People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952)	Jan. 19, '51 (App. Div.) Mar. 13, '52 (Ct. App.)
Scarpetta v. Spence-Chapin Adoption, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971)	Nov. 24, '70 (S. Ct.) Jan. 28, '71 (App. Div.) Mar. 1, '71 (Ct. App.)

The instant case, in particular, does not yet have a final order of disposition which is only an appealable order from Family Court, Family Court Act §1012. This case has dragged on for over two years. Transcripts, in spite of multiple requests, have not been made

available for either appeal or state habeas corpus. To force petitioner to raise the issue again in Family Court and then pursue appeals means the exhaustion of petitioner, rather than a remedy and will destroy the possibility of having his family re-united.

But even if it were not clear that the non-appealable refusal of the state to hear a habeas corpus led to an actual exhaustion of remedies, petitioner, at least, should have the right to make clear the deprivation caused by delay in this case. The duty of the District Court is to hear evidence as to the futility and delay in state procedures which require recourse to the federal courts. At the minimum, the District Court should

have allowed petitioner to put on his requested case as to the futility and tragic delays that would result if the federal court did not exercise its federal habeas corpus jurisdiction. As held in Jones v. Crouse, 360 F.2d 157 (10th Cir., 1966) the court must know the facts and circumstances of delay in order to conclude that the state rule provides effective federal remedies. For the scope of such an evidentiary hearing, see, in general, Smith v. Yeager, 393 U.S. 122 (1968) "[W]ithout knowing the facts and the circumstances giving rise to the delay, the trial court certainly could not conclude that the petitioner's state remedies are adequate and effective." Jones v. Crouse, supra, at 158. It has been said in Trammel v. Idaho, 459 F.2d

57 (10th Cir., 1972) "inexcusable delay in state court processes may itself become a denial of due process." Such an inexcusable delay is present here and could be prevented. Petitioner ought to, at least, have the right to present his case. See also, Dixon v. Florida, 388 F.2d 424 (5th Cir., 1968); Way v. Crouse, 421 F.2d 145 (10th Cir., 1970); Ex Parte Royall, 117 U.S. 241 (1886). The refusal to hear constitutes reversible error.

vi.

State Courts Should be Required to Enforce Constitutional Rights Against Family Courts.

It is important to stress what this case is and is not about. Petitioner

does not request access to federal courts every time a constitutional right is denied in Family Court or where facts warrant such an allegation. Rather, petitioner objects to the remand of his constitutional claims to that Family Court by the State Court. The federal habeas corpus should issue to ensure that no subsequent requests for state habeas corpus to correct constitutional abuses in Family Court are remanded and thus ignored by state courts. The State should conduct a hearing and conserve the constitutional rights. The relief petitioner seeks is not only the rightful return of his child and the proper preservation of his constitutional rights but also a declaration that when he seeks the vindication of his rights in State Court, that State

Court should act upon that petition. Such a ruling would in no way burden the federal courts or in no way require them to enter into Family Court adjudications. It would merely make sure that the State Courts operate to protect Constitutional rights, rather than remand uniformly back to the place where the rights were denied. Such a ruling is not a burden on the Federal Court but would, instead, ensure the proper functioning of State Court. The Family Court must be required to act with due process. The State Court must be required to ensure such action in their Family Courts. The Federal Courts should exercise its federal powers to protect those fundamental federal rights by habeas corpus in the instant case.

This case presents a series of frustrations. A father loses his children without his knowledge. He goes to Family Court countless times, without success, and loses another child on the basis of past findings. He attacks the jurisdiction and constitutionality of the procedures in State Court (while awaiting transcripts which still have not come). He is sent, by non-appealable order, back to Family Court; the unconstitutional source of all his frustrations. Surely, he has acted in good faith in the state system. Clearly, his rights are being violated. All he asks now is the end of that frustration, and the Federal Courts to exercise its power to get him or give him a fair hearing so

he can have his son, whom he has never seen at home, with him.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully sbumitted,

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Dated: New York, New York
January 8, 1973

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FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF NEW YORK

In the Matter of	:	
	:	Docket No.
DAVID ALEMAN	:	N1720/71
	:	
A Child under Eighteen Years of Age alleged to be Neglected.	:	

J. Lee Rankin, Corporation Counsel, by Karl Zukerman, Esquire, Department of Social Services, 250 Church Street, New York, New York 10007.
Attorney for Petitioner.

Stephen L. Kass, Esquire, by Walker Thompson, of Counsel, 176 East 106th Street, New York, New York.
Attorney for Respondent-Mother

Jonathan A. Weiss, Esquire, 142 West 87th Street, New York, New York,
Attorney for Respondent-Father

POLIER, J.: Neglect petition was filed by the Department of Social Services on behalf of David, born May 15, 1971. The petition alleges that the mother has been mentally ill and is observed to show behavior that endangers the welfare of the child.

It alleges that three older children of the parents were found to be neglected by this court, and are now in placement. Finally it alleges that the father has appeared and disappeared for extended times and has indicated he may again leave the family.

The infant was remanded to Mount Sinai Hospital by the Judge at Intake pending hearing by this Court. Hearings were held on July 14, and July 29, 1971 when both parents were present with their counsels. At the first hearing, Dr. Van Daele, a psychiatrist, who has been seeing the mother since August 1970 as consultant to the Visiting Nurse Association testified at length. He had first seen the mother following her discharge from Metropolitan Hospital and referral to the Visiting Nurse Association for after-care services. Dr. Van Daele received a history that the mother had hit her two-months old child while attempting to hit another

child. The admitting diagnosis at Metorpolitan Hospital had been Schizophrenia with hallucinations on July 17, 1970 and the diagnosis on release had been Schizophrenia, paranoid type.

Dr. Van Daele reviewed his interview with the mother, her mood swings, her depressed attitude at times, her reports of "seeing things" her ambivalence toward her eight year old, and the changing chemotherapy he had prescribed since August 1970. At times the mother skipped appointments and at times appeared silent and uncommunicative. At one time in June 1971 she spoke of her work to get the infant back, but at the present expresses preference to get the 14 month old child back who had been injured by her when he was two months old. Dr. Van Daele's diagnosis of the mother, like that of the hospital was Schizophrenia, paranoid type with mood sways.

Despite this history, and without reviewing the recent Mt. Sinai record, Dr. Van Daele testified he had told the parents he would recommend that the mother get one child back. He expressed the opinion that the return of one child would help the mother and he recommended the return of the 14 month old son on the basis of the mother's expressed preference. On cross-examination, Dr Van Daele acknowledged he had not gone into the relationship between the parents. He also acknowledged that although the mother had shown some improvement it was always possible that she would suffer recurring episodes which would place the children at risk.

At the hearing on July 29, 1971, the protective service worker of the Department of Social Service testified in regard to the previous neglect of the three older children, Belinda, born

January 21, 1963, Esperanza, born January 30, 1965 and Manuel born May 5, 1970. On motion of the petitioner, the record in the previous neglect petition was accepted in evidence and on further motion of the petitioner, the record of the Department of Social Service kept in the regular course of business was accepted in evidence.

On October 8,1970, Judge Bolin of this Court found that Belinda, Esperanza and Manuel were neglected children, finding that the allegations as set forth in the petition alleging neglect by the mother was supported by a fair preponderance of the evidence. These allegations included the inability of the mother to provide proper supervision or adequate care by reason of emotional condition and the diagnosis of mental illness, the

condition of Belinda, the striking of Manuel on July 9, 1970(then two months old) with a stick resulting in his admission to Metropolitan Hospital. Subsequently following investigation by Probation all three children were placed with the Commissioner of Social Services to May 6, 1971. These placements have been extended to August 9,1971 for review.

Following the submission of petitioner's case petitioner rested. Counsel for petitioner rested without calling the mother to testify. The father testified he had known the mother for eight years, that they had been separated for a time, and that he had married her last year, in 1970. He denied being the father of Belinda, but acknowledged paternity of Esperanza, Manuel and David. He testified he had been away at sea but had returned to New York

in November 1970. His testimony was not clear or convincing as to when he had lived with the mother and the children.

The entire record establishes by a preponderance of the evidence that the mother has been and continues to be a mentally ill person subject to mood swings, depressions and actions that put her children at risk. The father has been in and out of the family life and there is no evidence that he has provided or will provide a suitable home for the children.

Finding of neglect is made and the child David is adjudged a neglected child. Probation investigation is ordered and the remand of the child is continued for dispositional hearing September 16, 1971.

Dated: July 30, 1971

J.F.C.

FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK: COUNTY OF NEW YORK

In the Matter of

DAVID ALEMAN

A Child under Eighteen years of Age Alleged to be negelcted.

Docket #N1720/71

DECISION

J. Lee Rankin, Corporation Counsel, by Karl Zukerman, Esquire, Department of Social Services 250 Church Street, New York, N.Y. 10007 Attorney for Petitioner

Stephen L. Kass, Esquire, by Walker Thompson, of Counsel, 176 East 106th Street, New York, N.Y. Attorney for Respondent-Mother

Jonathan A. Weiss, Esquire, 142 West 87th Street New York, New York Attorney for Respondent-Father

POLIER, J.: Following extended hearings on July 14 and July 29, 1971, this court found that the record established by preponderance of the evidence that the mother has been and continues to be a mentally ill person subject to mood swings,

depressions and actions that put her children at risk. This Court further found that the father has been in and out of the family and that there was no evidence that he had provided or would provide a suitable home for the children. Finding was made that David was neglected. (See decision and opinion of July 30, 1971.) The three older children of the mother were found neglected by Judge Bolin on October 8,1970 and continue to be in placement under an order extending such placement to August 9, 1972. (N-2996-98/70)

The mother and father now seek the return of the infant David to their custody and care. At the dispositional hearing on December 28, 1971 the father testified he was now living with the mother. He cooks, cares for the mother, gives her medicine, and

cleans the apartment. He gives the mother four pills a day and she sleeps a major portion of the day. He testified he thought he would now continue in the home, caring for the mother until the children were released to her by the Court. He would then plan to stay with her and the children and return to Puerto Rico with her and then to a house owned by her family. He has not worked since October 17, 1970, though he would like to work, because the psychiatrist has told him not to do so till the mother was cured. A nurse comes to the home once a week and the mother is seen at Metropolitan Hospital every fifteen days.

The mother testified she had been married to the father of her three younger children on December 22, 1970 when he came from Puerto Rico. He accompanies her wherever she goes, cooks and cleans for her and stays in the home while she sleeps. When asked whether she thought she could care for the infant, the mother answered: "Well, I have my husband who helps me in everything."

The record in this case and the appearance of the mother establish beyond any doubt that the home of the father and the mother at this time is surely not a home in which adequate care, mothering, or even minimal supervision needed by David can be provided.

Placement to the Department of Social Services with request for progress report August 9, 1972 when report of siblings will be made on Neglect petition N 2996-98/70.

JUSTINE WISE POLIER
Judge of the Family Court

Dated: December 31, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of MANUEL ALEMAN

Next Friend of

DAVID ALEMAN, an Infant, for a Writ of Habeas Corpus

Index No. 72 Civ 1227

PETITION FOR WRIT OF HABEAS CORPUS

To the Hon. Edward Weinfeld,

Judge of the United States District Court for the Southern District of New York.

The petition of MANUEL ALEMAN, on behalf of DAVID ALEMAN, his infant son, respectfully represents:

1. Petitioner is a citizen of the United States and a resident of the County of New York, State and City of New York in this district.

2. DAVID ALEMAN is now actually, unlawfully and unjustly restrained of his liberty and detained under color of authority of the authority of the City of New York in the custody of JULE M. SUGARMAN, Commissioner of the New York City Department of Social Services.

3. The only claim and authority by virtue of which DAVID ALEMAN is restrained of his liberty are a series of orders by Family Court, whose jurisdictional and constitutional deficiences are outlined in the annexed affidavit of the attorney for the petitioner. The restraint is in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

4. A habeas corpus was brought in State Court on March 9, 1972 where the judge referred the case back to Family Court where there is still an outstanding order keeping the child from his parents except for a couple of

hours once every month. The details of the procedures are outlined in the annexed affidavit of the attorney for the petitioner. The return of the case to the Family Court, a non-appealable decision, exhausts state remedies and continues the unconstitutional restraint.

WHEREFORE, petitioner prays this Court to issue its Writ of Habeas Corpus addressed to JULE M. SUGARMAN, Commissioner of the New York City Department of Social Services, ordering and directing him to have the body of the petitioner DAVID ALEMAN, forthwith before the Court and at that time that petitioner be discharged further custody. Petitioner further prays that all proceedings in the Supreme and Family Court for the State of New York, County of New York,

be stayed pending the hearing and determination of this petition, and that this Court direct the time and manner of service of this application.

S/

JONATHAN A. WEISS
Attorney for Petitioner
2095 Broadway
New York, N.Y. 10023
Tel.: 595-1340

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of
MANUEL ALEMAN
Next friend of
DAVID ALEMAN, an Infant, for a Writ of Habeas Corpus

Index No. 72
Civ. 1227
AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MANUEL ALEMAN, being duly sworn, deposes and says that:

I am the father of the infant, DAVID ALEMAN, and I offer this Affidavit in support of my Petition for a Writ of Habeas Corpus.

I came back from my job as a member of the Merchant Marine to find that the Welfare Department had taken my children and that my wife was very upset. I went to Family Court about 20 times trying to get my children back.

They only let me see my children once per month and one of the children is beginning to forget my name. My son, David, has never been

home. No one ever told me what was going on until I got my lawyer, Jonathan Weiss.

I have done everything the Court has ever told me to do and the psychiatrist advised me to stay home with my wife until she is better.

I want to work and support my family but the doctors told me to stay home and take care of my wife. I will stay home and take care of my wife as long as they think I should and as soon as I can have my children I will go back to Puerto Rico where my family can help take care of my wife and I will go back to work.

I have been to the Family Court, as I said, about 20 times and to State Court twice. I see no reason why I should not have my son and I ask this Court to give me my son as fast as possible because his being kept away

from me has been so bad that he will never know me as his father and grow up as my son.

S/_____
MANUEL ALEMAN

Sworn to Before me this
22nd day of March, 1972

S/_____
NOTARY PUBLIC

MARY PING YUNG LING
Notary Public, State of New York
No. 31-2437775
Qualified in New York County
Commission Expires Marcy 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of MANUEL ALEMAN

Next friend of DAVID ALEMAN, an Infant, for a Writ of Habeas Corpus

Index No. 72 CIV 1227

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JONATHAN A. WEISS, being duly sworn deposes and says that:

I represent Mr. Manuel Aleman, petitioner in this case. As his attorney, I am fully familiar with the facts of this case. I submit this affidavit in support of his petition for Writ of Habeas Corpus on behalf of his infant son, David.

I became counsel in this case on June 15, 1971, upon the request of Mr. Manuel Aleman.

At that point, I discovered that he had never been served with any papers or informed as to the nature of the proceedings.

On my appearance at the fact finding hearing on July 30, 1971 I made a number of Motions, all of which were denied, including but not limited to the following:

a) that the Court had no jurisdiction because of improper service upon my client;

b) that evidence to establish current neglect of the fourth child was induced from a prior neglect finding against my client when he did not have counsel present and was not informed of his right to counsel;

c) that the provisions of the Family Court Act, §§1013 and 1031 which allowed the Family Court to obtain the custody of the child and the subject matter jurisdiction was uncon-

stitutional and, therefore, the Court had no jurisdiction;

d) that the Court had to recognize the constitutional rights of the family unity and parental rights under the line of cases starting with Meyers v. Nebraska and culminating with Engel v. Vitale and Armstrong v. Manzo;

e) that the burden of proof must be on the party alleging neglect;

f) that proof must be beyond reasonable doubt;

g) that the concept of neglect in the Family Court Act was applied in the prior case;

h) and that it was used as evidence for this case and, as defined in this case, is unconstitutionally vague.

These are the Motions I believe I made, among others.

After the hearing, I ordered a transcript and did not receive it. Such an occurence is common in Family Court. I have had two transcripts in the last year completely lost and the time of preparation varies from six months to over a year.

Subsequently, we had a Dispositional Hearing on August 12, 1971 where a psychiatrist testified that one of the three older children should be returned to the home. The Judge refused to do so. This transcript was also ordered and has not been forthcoming.

Subsequent to that, we had a Dispositional Hearing on DAVID ALEMAN in which the father testified, at length, as to his willingness and ability to take the infant son, David, home. No evidence was introduced

by anyone that he was not fit to take the child. The law guardian, representing the interest of the child, offered no official opinion. Nonetheless, Judge Justine Polier, in the attached Opinion, refused to return the child to his father. A transcript of that proceeding was ordered and is not yet available . It is, of course, impossible to pursue an appeal without transcripts. Because an appeal would take, maybe, many years with the delay of transcripts and the cumbersome procedure of appealing from Family Court and because of the urgency of restoring the child to its home, a habeas corpus was brought forth in State Court on March 9, 1972. The State Judge was informed that the basis for the habeas corpus was the emergency, the lack of jurisdiction in the Family Court and the lack of constitutionality of certain other procedures. Instead of hearing the case on the merits, the Court remanded the case back to Family Court, saying that the Family Court was the only appropriate forum. The Order remanding the case back to Family Court is not an Order which is appealable of right, therefore, there

is no way to continue the constitutional and jurisdictional challenge since the remand has been completed.

As attorney for the case, I believe that a reading of those transcripts would convince any Court that the immediate release of the infant David to his father is the only proper course, not only for the best interest of the child, but also because of the illegality of the Family Court proceedings. Such an outcome is one which must be achieved immediately as the harm is great and irreversible as the child only sees his parents once every two weeks. For time to drag on before he can establish a relationship with his parents at this tender age is extraordinarily destructive and cries out for immediate justice and return of the child.

As attorney for this case, I humbly suggest that this Court order that the Family Court immediately produce the transcript in the above-mentioned proceeding and issue a Writ to examine the transcripts and to allow petitioner to present his case as to why he should have his infant son who has been deprived of his father, and the father of him, without notice or proper procedure yet pursuant to an unconstitutional statute illegally and illogically applied.

JONATHAN A. WEISS

Sworn to before me

this 23rd day of March, 1972

S/
NOTARY PUBLIC

Angelina Mitchell
Notary Public of the State of New York
No. 31-2731265
Qualified in New York County
Commission expires March 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of	
MANUEL ALEMAN	
Next friend of	Index No. 72 Civ. 1227
DAVID ALEMAN, an infant,	
Petitioner	
-against-	
JULE M. SUGARMAN, AS Commissioner of the New York City Department of Social Services,	
Respondent.	

David Aleman, approximately ten months old has been found to be a "neglected child" in proceedings pursuant to the New York Family Court Act, sections 1013 and 1031 (McKinney Supp. 1971). His father petitions on his behalf for his release from the custody of the New York City Department of Social Services alleging the unconstitutionality of the relevant provisions and procedures of the Family Court Act.

In a proceeding brought by the Department of Social Social Services, motions to dismiss based on the same constitutional claims asserted here were denied. After a

fact-finding hearing, a judge of the New York State Family Court found that David Aleman was a "neglected child" and continued him in state custody. A dispositional hearing was subsequently held at which the parents sought their child's return. The judge found "beyond any doubt that the home of the father and the mother at this time is surely not a home in which adequate care, mothering, or even minimal supervision needed by David can be provided," and on December 31, 1971, ordered him placed with the Department of Social Services. David's mother appealed from that order and the appeal is still pending in the Appellate Division. David's father, however, sought to attack the order collaterally by filing the petition for habeas corpus in New York State Supreme Court, which was referred on March 9, 1972, to the Family Court for disposition. Thus far, he has failed to perfect that proceeding and it is still pending undetermined. When a disposition is entered therein, and should it be decided adversely, he has the right to appeal to the Appellate Division, where he can raise all his constitutional objections to the statute and its procedures. Obviously it is to be considered with the still pending appeal taken by his wife from the Family Court order. Unwilling to wait for the Family Court disposition and New York State appellate procedures, petitioner seeks federal relief.

It is surely hornbook law by now tha a petitioner must exhaust his state remedies, including appeal, before seeking federal habeas corpus relief.(1) Considerations of comity and respect for state procedures require that the state courts be given the opportunity to correct any constitutional errors.(2) As our Court of Appeals recently instructed in another context:

> " '[S]ensitivity to the legitimate interests' of New York required the district judge to withhold executing his own views, however deeply and sincerely felt, for the few days needed to enable the Appellate Division to determine whether it would grant the very relief he was asked to give." United States ex rel. Goodman v. Kehl, Docket No.. 72-1266 (2d Cir. March 14, 1972)

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(1) See 28 U.S.C. §2254 (b); Ex parte Hawk 321 U.S. 114, 116-17 (1944) (per curiam); United States ex rel. Carter v. York, 430 F. 2d 1329 (2d Cir. 1970) (per curiam); United States ex rel. Molinas v. Mancusi, 370 F 2d 601, 602 (2d Cir.), cert. denied, 386 U.S. 984 (1967); United States ex rel. Brock v. LaVallee, 306 F. Supp. 159, 161 (S.D.N.Y. 1969); Agone v. New York, 304 F Supp. 1139, 1141 (S.D.N.Y. 1969).

Petitioner may yet succeed in the Family Court, and in any event he has not exhausted appellate procedures. While petitioner attempted to explain his bypass of the New York Courts upon a claim that time is too critical for resort to them, there is no indication that New York has been dilatory in its proceedings; indeed, any delay in New York's appellate review may be the result of petitioner's decision to move by petition for habeas corpus rather than taking a direct appeal, and by his failure to perfect the proceeding in the Family Court, as acknowledged upon the argument of this petition. There is no reason to believe that petitioner will not receive prompt appellate adjudication of his claims in the New York Courts, if he so desires.(3)

The petition is denied.

Dated: New York, N.Y.
April 5, 1972

S/ Edward Weinstein
United States District Judge

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(2) See Picard v. Connor, 404 U.S. 270 275 (1971); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y. 1969); United States ex. rel. Knight v. Fay, 232 F. Supp 910, 911-12 (S.D.N.Y. 1964); Developments in the Law -- Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1093-94 (1970).

(3) See N.Y.C.P.L.R. § 5521 (McKinney 1963) (preferences on appeal); cf. N.Y. Family Ct. Act §1112 (McKinney Supp. (1971).

U.S. DISTRICT COURT
FILED APRIL 5, 1972
S.D. of N.Y.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of October one thousand nine hundred and seventy-two.

Present: HON. STERRY R. WATERMAN,

HON. J. JOSEPH SMITH

HON. IRVING R. KAUFMAN,

Circuit Judges,

In the Matter of the Petition of
Manuel Aleman, Next Friend of David Aleman, an infant,
Petitioner-Appellant,
v.
Jule M. Sugarman, Commissioner of the New York City Department of Social Services,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

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FILED
FEB 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-989

In the Matter of the Petition

of

MANUEL ALEMAN, next friend of DAVID ALEMAN, infant,

Petitioner-Appellant,

against

JULE M. SUGARMAN, as Commissioner of the New York City Department of Social Services,

Respondent-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

NORMAN REDLICH,
Corporation Counsel,
Attorney for Respondent-Appellee,
Municipal Building,
New York, N. Y. 10007.

566-4337

STANLEY BUCHSBAUM,
IRVING GENN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-989

In the Matter of the Petition

of

MANUEL ALEMAN, next friend of DAVID ALEMAN, infant,

Petitioner-Appellant,

against

JULE M. SUGARMAN, as Commissioner of the New York City Department of Social Services,

Respondent-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statement

In a habeas corpus proceeding arising from a state neglected child proceeding, the petition seeks a writ of certiorari to review an order of the Court of Appeals, Second Circuit, entered October 18, 1972, which unanimously affirmed an order of the District Court for the Southern District of New York (WEINFELD, J.), entered April 5, 1972, that dismissed the petition.

Issues

The issue is whether a party who brings a state habeas corpus proceeding may bypass it and seek federal habeas corpus. The District Court held no, citing 28 U.S.C. § 2254(b) and many cases for the settled rule that a petitioner must exhaust his state remedies, including appeal, before seeking federal habeas corpus relief. Its determination was affirmed without opinion.

Facts

(1)

On May 21, 1971, the New York City Department of Social Services brought a neglect petition for the protection of an infant, David Aleman (8a-10a).* The petition alleged (9a):

> "Child is likely to suffer serious harm in that respondent mother has a serious psychiatric problem. Has been diagnosed as schizophrenic and psychotic. Since the birth of David May 15, 1971, mother has displayed marked agitation, suspiciousness, paranoia, rapid mood change, and even while feeding the infant has been observed from giggling to depression to sleep. Mother has been on 24 hour suicide watch since May 18, 1971. Mother has three (3) children in addition to the infant David, and these children were found to be neglected children by this Court and are currently in foster homes through McMann [*sic*] Shelter. Respondent father has in the past appeared and disappeared for extended periods of time, has not been employed since 1965, and has indicated he may leave again as soon as things settle down."

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* Parenthetical references with suffix "a" ar to appellant's appendix in the Circuit Court. Parenthetical references without suffix are to appellant's appendix to this Court.

(2)

Hearings were held on July 14 and July 29, 1971. Both parents attended with counsel (2, 19).

Dr. Van Daele, a psychiatrist, testified that he had been seeing the mother since August 1970, following her discharge from Metropolitan Hospital. He had received a history from the hospital that the mother had struck and injured her child Manuel at a time when he was two months old while attempting to hit another child (2-3). The hospital diagnosis was schizophrenia, paranoid type (3). Dr. Van Daele's diagnosis was the same (*id.*). He said that return of one child, Manuel, would help the mother. He testified that, although the mother had shown some improvement, it was always possible that she would suffer recurring episodes, which would place her children at risk (4).

At a further hearing on July 29, 1971, testimony and a record were received in evidence of a previous proceeding in which three older children (Belinda, age 8; Esperanza, 6, and Manuel, now 14 months) were found to be neglected children (5).

The mother did not testify (6). Counsel for the petitioner, the father, made several motions to dismiss the neglect petition involving David on grounds of lack of jurisdiction, statutory vagueness and violation of rights under the First Amendment (35a).

The motions were denied, and the petitioner took the stand (6). He acknowledged that he was the father of David, Manuel and Esperanza (*id.*). He testified that he had been away at sea and had returned to New York in November 1970 (*id.*).

The Family Court found (7):

> "The entire record establishes by a preponderance of the evidence that the mother has been and continues

to be a mentally ill person subject to mood swings, depressions and actions that put her children at risk. The father has been in and out of the family life and there is no evidence that he has provided or will provide a suitable home for the children.

"Finding of neglect is made and the child David is adjudged a neglected child. Probation investigation is ordered and the remand of the child is continued for dispositional hearing September 16, 1971."

At the dispositional hearing the petitioner testified that he was living with the mothe and caring for her (9). Upon return to him and his wife of the children, he intended to return to Puerto Rico (10). His affidavit elucidates his testimony, stating that he intends to go back to Puerto Rico where his family can help take care of the wife while he goes back to work (17). His job is in the merchant marine (16).

Family Court held (11):

"The record in this case and the appearance of the mother establish beyond any doubt that the home of the father and the mother is surely not a home in which adequate care, mothering, or even minimum supervision needed by David can be provided."

(3)

The order of disposition entered December 31, 1971, following this hearing, placed the child in custody of the Department of Social Services (22a). He is being cared for in the McMahon Shelter (17a).

The mother filed a notice of appeal from the dispositional order of Family Court, but she has not perfected it. The petitioner applied to the Supreme Court, New York County, for a writ of habeas corpus. On March 9, 1972, the Supreme Court transferred the petition to the Family

Court (35a), pursuant to New York State Constitution, Art. 6, § 13, par. c, and the Family Court Act, § 651. On March 23, 1972, the petitioner applied to the District Court, Southern District, for a writ of habeas corpus.

Decisions Below

The District Court denied the petition. The opinion of Judge WEINFELD pointed out that petitioner's state habeas corpus proceeding has not been perfected by him and that, if a disposition of it adverse to him had been made by Family Court, the petitioner could have appealed to the Appellate Division. "Obviously it is to be considered with the still pending appeal taken by his wife from the Family Court order," the Court said (27).

Noting that the father was unwilling to wait for the Family Court disposition and New York appellate procedures, and sought habeas corpus in the federal court, the Court stated (28):

> "It is surely hornbook law by now that a petitioner must exhaust his state remedies including appeal before seeking federal habeas corpus relief. Considerations of comity and respect for state procedures require that the state courts be given the opportunity to correct any constitutional errors."

The opinion said that the petitioner might yet succeed in the Family Court and in any event had not exhausted state appellate procedures. It added (29):

> "While petitioner attempted to explain his bypass of the New York courts upon a claim that time is too critical for resort to them, there is no indication that New York, has been dilatory in its procedures; indeed, any delay in New York's appellate review may be the result of the petitioner's decision to move by petition for habeas corpus rather than taking a direct appeal,

and by his failure to perfect the proceeding in the Family Court, as acknowledged upon the argument of this petition. There is no reason to believe that petitioner will not receive prompt appellate adjudication of his claims in the New York courts if he so desires." [Citing New York CPLR 5521; cf. New York Family Court, Act, § 1112].

On appeal, the Second Circuit affirmed unanimously, without opinion.

Statute

28 United States Code § 2254 provides in pertinent part:

"§ 2254 state custody; remedies in federal courts.

• • •

(b) An application for a return of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

ARGUMENT

Habeas corpus relief was properly denied where petitioner has failed to exhaust state remedies.

(1)

This brief maintains that certiorari should be denied because this case presents no novel or substantial Federal question. It is well settled that a petitioner must exhaust his state remedies before seeking federal habeas corpus. 28 U.S.C. § 2254(b); *Ex Parte Hawk*, 321 U.S. 114, 116-117

(1944); *Nelson* v. *George*, 399 U.S. 224, 229 (1970); *Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *United States ex rel. Molinas* v. *Mancusi*, 370 F. 2d 601 (2nd Cir., 1966), cert. den. 386 U.S. 984 (1967); *United States ex rel. Griffin* v. *Martin*, 409 F. 2d 1300 (2nd Cir., 1969); *United States ex rel. Carter* v. *York*, 430 F. 2d 1329 (2nd Cir., 1970).

Petitioner has failed to satisfy this requirement. His state habeas corpus petition, referred by the New York Supreme Court to the Family Court (a State Court), pursuant to New York State Constitution, Art. 6, § 13, par. c, and Family Court Act, § 651, is still pending. Should it be decided adversely to him, he could appeal to the Appellate Division, First Department, and to the New York Court of Appeals. As the District Court noted (27), such an appeal could be joined with the mother's pending appeal to the Appellate Division.

Thus, the state courts would have "the initial opportunity to pass upon and correct" the alleged violations of federal rights. Absent such an initial opportunity, it would be contrary to federal policy and "unseemly to our dual system of government" for the federal District Court to consider habeas corpus. *Picard* v. *Connor, supra,* 404 U.S. 270, 275.

(2)

Conceding these principles, petitioner's brief seeks to avoid them and excuse his neglect to pursue state remedies upon grounds which are incorrect and ineffectual as a matter of law and fact.

Petitioner maintains that he will not receive a fair hearing before the Family Court. It is scandalous to argue that the multi-part Family Court, upon a lawful constitutional referral from the State Supreme Court, will neglect its duty of considering afresh the contentions raised by the habeas corpus petition. The statement in petitioner's brief (p. 24) that the same Family Court judge

who heard the original proceeding is likely to hear the State habeas corpus motion is casuistry. As petitioner's counsel undoubtedly knows, Judge POLIER has retired. In any event, petitioner does not and cannot allege that the state's appellate courts will not grant a full and fair review.

Similar conclusory contentions, that pursuit of state remedies would be in vain and that therefore federal habeas corpus should issue forthwith, have been advanced and rejected many times. *Cruysen* v. *Scudder*, 215 F. 2d 512 (9th Cir., 1954); *Dana* v. *Tracy*, 360 F. 2d 545 (1st Cir., 1966); *United States ex rel. Storch* v. *Maroney*, 231 F. Supp. 385 (D.C. Pa., 1964). Mere anticipation of an adverse decision or the lack of probability of success will not excuse a failure to exhaust state remedies. *Boyd* v. *State of Oklahoma*, 375 F. 2d 481 (10th Cir., 1967); *Oliver* v. *State of California*, 364 F. 2d 311 (9th Cir., 1966); *United States ex rel. Touhy* v. *Ragen*, 224 F. 2d 611 (7th Cir., 1955).

(3)

The petitioner also claims that the exhaustion doctrine should be disregarded because pursuit of his remedies in the state courts would involve delay. However, as District Court pointed out, there was no showing that the state courts had been dilatory, and the petitioner acknowledged on oral argument that his own decision to move by habeas corpus rather than direct appeal, complicated by the failure to perfect the habeas corpus proceeding in the Family Court, may have created delay (29).

Where the need for expeditious review is urgent and counsel for the appellant acts appropriately, the New York appellate courts provide extremely rapid review. A number of election cases have moved from *nisi prius* court decision to Court of Appeals decision within a week. Other types of cases where speed was of the essence have, at times, taken little longer. There are indications that the petitioner in this matter could, had he sought it and

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had his counsel taken the proper steps, have obtained a rapid review by the State courts.

For example, in *Matter of Gary*, 37 AD 2d 932 (1st Dept. 1971), where a parent in a neglect proceeding raised jurisdictional issues similar to those raised here, an appeal from a Family Court order of June 1, 1971 was decided November 4, 1971 by the Appellate Division (a period of five months despite summer recesses). In *Scarpetta* v. *Spence-Chapin Adoption*, 28 NY 2d 185 (1971), cited by the petitioner, a November 24, 1970 order of the Supreme Court was decided by the New York Court of Appeals on April 7, 1971 (about four months).

By contrast, the petitioner, who brought the instant federal habeas corpus on or about March 22, 1972, was denied relief by the District Court April 5, 1972. His counsel did not seek a stipulation concerning the appendix until early in June, 1972, and the appeal was heard and decided in the September 1972 term of Circuit Court. The instant petition for certiorari will necessarily involve further delay. It is noteworthy that the order of the Second Circuit is dated October 18, 1972, and that the petition for certiorari was not served on this office until January 15, 1973. Therefore, it is apparent that he would have obtained a quicker determination if he had assiduously pursued his state remedies, as did the parties in the *Gary* and *Scarpetta* cases.

In any event, mere anticipation of delay in state habeas corpus or other post-decisional proceedings is not grounds for bypassing the state courts. *Baldwin* v. *Lewis*, 442 F. 2d 29 (7th Cir., 1971); *Allen* v. *Leeke*, 328 F. Supp. 292 (D.C., S. C. 1971).

(4)

As an excuse for his delay, the petitioner pleads inability to obtain transcripts of previous hearings in the Family Court. However, the questions of jurisdiction and constitutionality which he seeks to raise by habeas corpus do not

necessarily require these transcripts as his brief below indicated (p. 16).

Counsel asserts that he ordered the transcripts. But his affidavit (19) alleges nothing as to the follow-up steps he took to obtain them; nor does it delineate petitioner's need of them. This is insufficient. A party raising such an argument must factually show that he pursued all state avenues to secure the records and why they are necessary for the particular issues he seeks to raise. *Briggs* v. *State of Missouri*, 321 F. Supp. 649 (D.C., Mo., 1971); see also *Cruysen* v. *Scudder*, 215 F. 2d 512 (9th Cir., 1954); *Johnson* v. *Midlebrooks*, 383 F. 2d 386 (5th Cir., 1967).

It should be pointed out that ordinarily there does not appear to be any problem in obtaining transcripts from the Family Court promptly. This office regularly handles many matters in that court. While it rarely orders a transcript, when it has ordered one it has been provided quickly, sometimes within a few days. In addition, the Legal Aid Society handles many Family Court cases in which this office is its adversary. Repeatedly we have been shown transcripts obtained by the Legal Aid Society within a week or two after a hearing in that Court was completed.

(5)

While we see no reason why there should be any inordinate delay in deciding the petitioner's state habeas corpus proceeding and appeals from it, provided petitioner pursues his remedies efficiently, we cannot agree with the theory of his brief that speed is the primary consideration here. The primary consideration in a case involving neglect is the welfare of the child. Family Court Act, § 1011; *Matter of Desiree T.*, 64 Misc 2d 28, 34 (Fam. Ct., Kings Co., 1970).*

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* Petitioner's brief (p. 26) challenges this position, but it inconsistently quotes, with approval (p. 16), language to the same effect in a concurring opinion in *May* v. *Anderson*, 345 U.S. 528 (1953).

In the instant case, involving a mentally disturbed mother and a frequently absent father, a too hasty decision holds the potential of tragic consequences to the infant. Petitioner would place an unreasonable burden upon the District Court when he demands a bypassing of state due process and a summary disposition under these circumstances.

(6)

Petitioner cites *Fay* v. *Noia*, 372 U.S. 391 (1963). The unusual facts in that case were that Noia, sentenced to life for first degree murder, did not appeal the conviction, apparently because of fear that he might be sentenced to death if retried. However, his co-defendants did exhaust their appeal and other state remedies and eventually were freed by federal habeas corpus on the grounds of coerced confession. At this point, Noia sought relief in the state courts only to be met by the circumstance that his time to appeal had long expired and that coram nobis was not available, absent an appeal. This Court ultimately granted him habeas corpus, stating that state avenues were no longer available to Noia when he sought federal habeas corpus. The Court said (372 U.S. 435):

> "We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas corpus applicant at the time he files his application in District Court."

This erodes petitioner's position. The state habeas corpus which he initiated and then neglected is still pending. Any subsequent appeals arising from it are still open to him. He, therefore, cannot escape the rule that a party who applies for state post-decisional relief must complete that course before turning to federal District Court. *United States ex rel. Brabham*, 282 F. Supp. 105 (D.C., Pa., 1968).

In *Lucas* v. *State of Michigan*, 420 F. 2d 259 (6th Cir., 1970), cited by the petitioner, the Court of Appeals waived

the requirement of exhaustion where there was a distinct line of cases in the state's highest appellate court contrary to petitioner's position that the search and seizure provision of the Michigan Constitution was in conflict with the United States Constitution, Fourth Amendment. In the instant case the petitioner does not contend that the New York Court of Appeals has adopted a fixed position on the issues he would raise.

The issue of denial of counsel that petitioner seeks to raise is not present in the case at bar which involves only the child David, for petitioner admittedly had counsel in this case (19). In any event, petitioner's brief (p. 14), by citing *Matter of Beaton*, 30 NY2d 352 (1972), concedes that the New York State Court of Appeals can and will give due consideration to such an issue, if properly raised.

Stanley v. *Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972), also cited by petitioner, holds that an unmarried father cannot be denied custody of his child without a hearing. This has no application to the instant case where the record shows that there were several hearings at which the petitioner appeared with counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

February 13, 1973

Respectfully submitted,

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Introduction

This brief is divided into two parts; the first part will correct misstatements of fact, the second will attempt to clarify legal holdings in order that the issues are not further clouded in this case.

MISSTATEMENTS OF FACT

This section of the brief will isolate those statements of the Brief in Opposition which are clearly erroneous so that this court will not be misled by fabrications. We will deal with errors in describing timing, the functions of family court, and irrelevance of statements, events, and cases.

Timing

On page 5, respondent states, "The father was unwilling to wait for the Family Court disposition and New York appellate procedures." On page 7, the respondent stated that, "The appeal could be joined with the mother's pending appeal to the Appellate Division." On page 9, the respondent lists a series of dates for the appeal in the Federal court to imply lengthy delay. Also, on pages 9 and 10, respondent attempts to explain away the failure to have transcripts as rendering any State appeal impossible.

The facts are:

1) Petitioner has taken every step possible to get those transcripts (and respondent cannot claim he did not). The transcripts were essential for any appeal since they contained the motions and events which constituted the constitutional attack. To this date, the transcripts have never appeared in spite of requests and orders to judge and court reporters. As to the difficulty of obtaining transcripts in forma pauperis, this matter should have been the subject of a fact-finding hearing at a habeas corpus (under 2254) where many attorneys familiar with Family Court would have testified as to the difficulty and often impossibility of obtaining such transcripts.

2) There is no pending appeal by the mother in the Appellate Division. The Notice of Appeal was filed by different counsel than that of petitioner and never followed up.

3) There was no matter of unwillingness to wait for Family Court dispositional hearing. As of January 2 of this year (the last court pronouncement), there was no "dispositional" decision ever made in spite of over 30 court appearances.[1]

4) As far as the speed and value of a Federal habeas corpus, if the habeas corpus had issued when brought on March 22, that would have been a considerable saving of time. The fact that an appeal has been necessary from the erroneous refusal to issue that immediate relief then, and that appeal has consumed eight or nine months, does not mean that remedy is slow but rather that the relief should have issued when requested, then and there.

5) In particular, it should be noted that respondent omits the fact that immediately after the denial of relief by the District Court,

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[1] Neglect trials are bifurcated. There is first a fact-finding then a dispositional the only order which can be appealed from. In many cases such as this, there are many "hearings" with placement of children before any "dispositional" hearing and order is had.

petitioner brought a motion for an immediate hearing by the Second Circuit Court of Appeals which motion was opposed by the respondent, in part, because of the claim that they were unfamiliar with the subject matter. The motion was denied. Subsequently, the briefs and appendix were filed in the statutory time limit and no extension of time was ever sought by petitioner. Petitioner did grant respondent an extension of time because of assurances that it would cause no delay in hearing argument. The Petition for Certiorari, of course, was filed also within the statutory limit.

Family Court

Respondent stated "It is scandalous to argue that the multi-part Family Court... will neglect its duty of considering afresh the contentions raised by the habeas corpus petition." (p. 7) He then contradicts himself, stating, "The primary consideration in a case involving neglect is the welfare of the child." (p. 10) One or the other of these statements must be false. Either Family Court will not

entertain these constitutional arguments which it had once rejected on the grounds that the primary consideration is the welfare of the child or it will consider them as basic. It is our contention that the second statement on page 10 reveals the true state of affairs and that the Family Court will not objectively examine the previously rejected attack on its constitutionality and procedure, but consider their past actions not only the law of the case but also again hold that their "primary" concern for the child renders constitutional and jurisdictional defects unimportant.

It should be noted that respondent states that Judge Polier has retired and therefore the case would not have gone back to her (p. 8). Judge Polier's last opinion in this case was on January 2, 1973. The Federal habeas corpus was brought on March 22, 1972 -- over nine months before her retirement on January 31, 1972. (See New York Law Journal, March 1, 1973, p. 1, column 7.)

Irrelevant Cases

Respondent states further that the Matter of Gary, 37 A.D. 2d 932, raised jurisdictional issues similar to those raised here and was handled expeditiously. There is no evidence of this in the reported decision or any reason in that record to lend any support to this contention. A glance can tell any reader that.

On page 12, respondent states that the Matter of Beaton, 30 NY_2 352 (1972) controls this case and that David Aleman in fact had counsel.[2] What is at stake in the present case is the inference to present neglect from a finding of past neglect where counsel was not present and parent not notified. The motion by counsel, when counsel was present, to re-open was denied and is one basis for habeas corpus.

Finally, respondent maintains that

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[2] Matter of Beaton was decided three months subsequent to the Federal habeas corpus denial.

"petitioner acknowledged on oral argument that his own decision...may have created delay." p. 8 This is a totally false statement of what was said and a misreading of the District Court decision. What petitioner had acknowledged was that he had failed to perfect, as did the state, the papers effectuating the remand from the Supreme Court to Family Court. It has been his contention always that this would be an act of futility. This acknowledgement and position were clear to <u>all</u> at District and Circuit Court level and should be clear in this court.

These misstatements of fact, although not critical to the legal argument might be distracting and we hope the truth is now clear. The essential point is this: the time-consuming referral back to Family Court which had rejected the claim denies due process and exhausts state remedies. There either should have been a hearing as

to the facts of delay and futility or the issuance of a habeas corpus to bring immediate relief.

MISSTATEMENTS OF LAW

The following section will attempt to clarify what the cases really held in this area to correct some misleading citations. We will select certain statements for clarification.

Futility of Pursuing Family Court Remand

"Similar conclusory contentions, that pursuit of state remedies would be in vain and that therefore federal habeas corpus should issue forthwith, have been advanced and rejected many times." Respondent's brief, p. 8.

Petitioner is not making purely "conclusory contentions" that pursuit of state remedies would be in vain. He is asking for a federal evidentiary hearing to determine whether, in fact, a state remedy which remands the identical issues of law and fact to the court which originally decided the case, for a collateral

hearing is an effective state remedy. In view of Lucas v. State of Michigan, 420 F.2d 259 (6th Cir., 1970), such a preliminary hearing appears to be mandated.

In addition, all petitions contain allegations concerning futility. How would respondent distinguish the petition in this instance from a petition alleging a Lucas unfavorable precedent? Who is to determine if the decision of the state court is on point or can be distinguished? Petitioner makes his allegations and then, at a subsequent hearing presents evidence on the point.

The cases cited by respondent in support of his claim all are radically different or irrelevant.

Cruysen v. Scudder, 215 F.2d 512 (9th Cir., 1954) is an outdated, pre-Fay v. Noia, 372 U.S. 391 (1963) case. Petitioner had appealed his conviction through the California state courts but had failed to petition for a writ of certiorari because

the warden had lost necessary papers. He then sought federal habeas corpus, alleging the futility to apply to state courts since they passed on the "exact questions which could be presented by a petition for the writ." The District Court required petitioner to file for state collateral relief anyway, not because the same issue futility theory was incorrect, but because, after the state courts had all rejected his claim, petitioner could "apply to the United States Supreme Court for a writ of certiorari and thus exhaust a remedy which he has failed to avail himself." The rationale, then, goes to a pre-Fay v. Noia exhaustion concept.

Dana v. Tracy, 360 F.2d 545 (1st Cir., 1966) is a peculiar case in which the facts make in inapposite. Petitioner was jailed because he could not make bail. Petitioner withdrew his state appeal so that his 30-day sentence would start to

run. He failed to pursue any state post-conviction relief. He filed his federal petition with six hours left on his sentence. Yet, the court ordered the District Court to retain jurisdiction while petitioner filed his state writ in order to keep the issue from mooting with expiration of sentence. Here there was no withdrawal but instead denial.

In U.S. ex rel Storch v. Maroney, 231 F. Supp. 385 (D.C. Pa., 1964) petitioner filed a writ before a state court. He then claimed sham and filed in the federal court. There was some doubt as to whether petitioner had pursued his available state remedy in good faith. Here there was complete pursuit and complete frustration.

Clear Futility Obviates Necessity of Pro Forma Exhaustion of State Court Remedies

"Mere anticipation of an adverse decision or the lack of probability of

success will not excuse a failure to exhaust state remedies." Respondent's brief, p. 8.

This conclusory rule would seem highly inconsistent with the Lucas line of cases. Petitioner's plight even appears to present an even greater certainty of adverse decision and futility.

The cases cited by respondent have no bearing:

In Boyd v. State of Oklahoma, 375 F.2d 481 (10th Cir., 1967) petitioner neither appealed nor sought state post-conviction relief. There "the state provides a suitable procedure for considering the issues herein presented but appellant has deliberately chosen to by-pass them and seek relief in the federal courts." This is hardly the case here. Petitioner has applied for state relief, and been permanently denied, but "no suitable procedure"

exists, so he reluctantly must seek a hearing in federal court. There is no state court procedure to pursue, so he must seek relief in federal courts.

U.S. ex rel. Touhy v. Ragen, 224 F.2d 611 (7th Cir., 1955) is completely off point. Petitioner failed to prosecute a writ or error to review his prosecution (possibly due to indigency or due to a contrary state decision directly on point); and also failed to prosecute a state habeas corpus attack (which remedy was no longer available to him due to the applicable limitation). The court held that he failed to exhaust his remedies in both respects. Today, Lucas would throw his failure to seek review into a new light; and Fay would over-rule the second failure to exhaust since state habeas corpus was no longer available.

Oliver v. State of California, 364 F.2d 311 (9th Cir., 1966) seems to be a case

where petitioner failed to seek state relief because of an adverse state decision directly on point. In addition, by the time of the court's decision, the federal courts had a Supreme Court ruling in agreement with that of the state and therefore petitioner had no case. In any case, the decision would seem out of step with Lucas.

Insupportable Delay as a Fact Necessitates Federal Intervention

"In any event, mere anticipation of delay in state habeas corpus or other post-decisional proceedings is not grounds for bypassing the state courts." Respondent's brief, p. 9.

The cases cited in Brief are not on point and, in fact, contain the seeds of the destruction of respondent's point.

Baldwin v. Lewis, 442 F.2d 29 (7th Cir., 1971) is a case where there was a one day lapse between the filing of the state and federal habeas corpus. The court did not purport "to determine here what period of time should be necessary" to

persuade a federal district court that inordinate delay existed (cf. Smith v. Kansas, 356 F.2d 654, and only held that the one day lapse was not such a delay.

In fact, the court held that "each case has to be judged on its own factual situation" and intimated that, in the case of a minor in original detention without bail, a very short time (two months or less) might represent such a delay (see p. 33). This would, in the case of a neglected child proceeding, militate for a factual hearing to evaluate the delay, past and expected, against the facts of a child in custodial care away from his parents.

Allen v. Leeke, 328 F. Supp. 292 (.D., S.C. 1971) also stated that "what might be 'inordinate delay' in one case might not be such in another. The particular circumstances of each case will determine whether the delay is excessive." at 295.

In addition, petitioner applied directly to the federal courts and experienced no state delay himself.

Missing Transcripts Render State Remedies Useless

"Counsel asserts that he ordered the transcripts. But his affidavit alleges nothing as to the follow-up steps he took to obtain them; nor does it delineate petitioner's need of them. This is insufficient. A party raising such an argument must factually show that he pursued all state avenues to secure the records and why they are necessary..." Respondent's brief, p. 10.

The cases cited here are not on point. Cruysen v. Scudder, supra, is misconstrued. It contains no language on the subject. Though the reason for petitioner's failure to petition the Supreme Court for certiorari was based on the fact that the papers he needed were lost (it's never clear if they were transcripts).

the case was decided on the basis of the now over-ruled pre-Fay doctrine of exhaustion of remedies.

Briggs v. Missouri, 321 F. Supp. 649 (D.C. Mo., 1971) and Johnson v. Middlebrooks, 383 F.2d 386 (5th Cir., 1967), have language similar to that of respondent's brief. However, they are based upon Wade v. Wilson, 396 U.S. 282 (1976), where the petitioner's sole claim in his habeas corpus petition was that the state's failure to provide him with free transcript for a habeas corpus petition violated due process and equal protection. The court didn't reach the issue because it felt petitioner could get the transcript through use of proper motion practice. This is hardly the case here. Petitioner is not on a fishing expedition. His petition presents specific constitutional challenges to the state decision. The denial of due process through failure to

provide a transcript for an unsupported habeas petition is not in issue. The transcripts missing here have been properly ordered and would be essential to a completion of a state appeal.

Appellee further suggests that there may be no need for transcripts on appeal (p. 10). This startling suggestion has long been discarded by the cases of Griffin v. Illinois, 351 U.S. 12 (1955); Hardy v. U.S., 375 U.S. 277 (1963); Coppedge v. U.S., 369 U.S. 378 (1961). Clearly, counsel needs the transcript of the denied motions, of the introduction of evidence of neglect being introduced from a hearing where the father was not present and unrepresented and the hearing where the first neglect adjudication

was made against the absent parent.

The Rights of a Family Unit Must Be Respected

"The primary consideration in a case involving neglect is the welfare of the child." Respondent's brief, p. 10.

The case cited for this startling claim, Matter of Desiree T, 64 Misc. 2d 28 (in a lower New York Court) is not at all on point with the issues of this case. That case derived the principal by citing and quoting Judge Dembitz in Matter of Blaine, 54 Misc. 2d 278. This case determined whether criminal rules of evidence would apply to admission of psychiatric evidence in neglect

dispositional hearings (by an analogy of neglect cases with delinquency determinations); or looser civil standards (by analogy to custody actions). The court decided that neglect proceedings were more closely akin to custody actions and applied more liberal standards. Therefore, the court was looking at purpose from an evidentiary rather than substantive view. It was not attempting to limit, or define, what the child's interest was, but only to draw analogies with either civil or criminal litigation in general for a specific and limited purpose.

Moreover, the basic point remains: the family is a fundamental unit. See petitioner's petition, page 17, and cases cited therein. We are all concerned for all children, but before the state can enter into and interfere with a family, it must proceed on adequate reasons and with due process. Lack of jurisdiction,

lack of counsel, lack of constitutional requirements, cannot be cured retroactively by the cliche of "best interest of the child."

CONCLUSION

For the reasons set forth above and in the petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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